Supreme Court, U.S.
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No. 02-896

IN THE
Supreme Court of the United States
OCTOBER TERM, 2002

FLUOR HANFORD, INC., AND
FLUOR FEDERAL SERVICES, INC.,

Petitioners,

v.

SCOTT BRUNDRIDGE, DONALD HODGIN, JESSIE JAYMES,
CLYDE KILLEN, PEDRO NICACIO, SHANE O'LEARY,
RAYMOND RICHARDSON, JAMES STULL, RANDALL WALLI,
DAVID FAUBION, AND CHARLES CABLE,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals of Washington

REPLY TO BRIEF IN OPPOSITION

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As noted in the petition, this case presents two important and recurring legal issues on which the lower federal and state courts are divided: (1) whether unionized workers can avoid the exclusive jurisdiction of the National Labor Relations Board (NLRB) over unfair labor practices by bringing a lawsuit alleging wrongful discharge in violation of state public policy, *see* Pet. i, 6-13, and (2) whether unionized workers can avoid an arbitration clause in their collective bargaining agreement by invoking a presumption *against* arbitration of individual employment-related claims, *see id.* at i, 14-18. Respondents attempt to deflect attention from those two issues by arguing the *merits* of their claims, and insisting that the decision below is correct. The issue here, however, is not which side will ultimately prevail in this dispute, but whether a court (as opposed to the NLRB or an arbitration panel) is the appropriate forum to address the dispute in the first place. On that issue, respondents cannot deny that the decision below exacerbated longstanding and acknowledged conflicts among the lower courts. Accordingly, this Court's review is warranted.

1. With respect to preemption under the National Labor Relations Act, 29 U.S.C. § 151 *et seq.*, respondents do not deny that their state-law wrongful-discharge claim involves concerted activities under the Act, and is thus presumptively preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959). Instead, respondents (like the court below) assert that their claim survives *Garmon* preemption because it involves "'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act.'" Opp. 13 (quoting *Garmon*, 359 U.S. at 244).

The problem with that assertion, as noted in the petition, is that it would allow a narrow exception to *Garmon* preemption to swallow the rule. The whole point of *Garmon* preemption is to protect the NLRB's role as the principal arbiter of American industrial relations. *See, e.g., Garmon*, 359 U.S. at

241-46; *Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees v. Lockridge*, 403 U.S. 274, 286-91 (1971); *Wisconsin Dep't of Industry, Labor & Human Relations v. Gould*, 475 U.S. 282, 286 (1986). To that end, *Garmon* "broad[ly]" preempts state-law claims that even *arguably* involve unfair labor practices. *Lockridge*, 403 U.S. at 284; *Garmon*, 359 U.S. at 245. Contrary to the decision below, the "local interest" exception to the *Garmon* rule does not allow States to "regulat[e] discriminatory employment practices" involving unionized workers, Pet. App. 11a; instead, that exception only allows state-law claims "deeply rooted in local feeling and responsibility" that are "*unrelated* to employment discrimination," *Farmer v. United Bhd. of Carpenters & Joiners*, 430 U.S. 290, 296, 305 (1977) (emphasis added). A dispute between unionized workers and their employer *over the validity of their discharge from employment* thus does not fall within that narrow exception; rather, such a dispute falls within the very heartland of the NLRB's domain. Indeed, this Court has *never* found a state-law wrongful-discharge claim to escape *Garmon* preemption. *See* Pet. 12-13.

Respondents base their contrary argument on *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857 (9th Cir. 1987), and *Inter-Modal Rail Employees Ass'n v. Burlington N. & Santa Fe Ry. Co.*, 73 Cal. App. 4th 918 (1999). *See* Opp. 13-14. *Paige*, however, was specifically rejected by *Platt v. Jack Cooper Transport Co.*, 959 F.2d 91, 95 & n.7 (8th Cir. 1992), which in turn was specifically rejected by *Inter-Modal*, 73 Cal. App. 4th at 927-28. Respondents try to deny this conflict by asserting that "the construction given to *Garmon* by the Eighth Circuit [in *Platt*] does not differ significantly from that arrived at by other courts." Opp. 15. They are wrong.

The *Platt* court specifically held that "the critical inquiry for *Garmon* preemption purposes is 'whether the controversy presented to the state court is identical to . . . that which could

have been, *but was not*, presented to the Labor Board.'" 959 F.2d at 95 (quoting *Sears, Roebuck & Co. v. San Diego Cty. Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978) (emphasis added)). Respondents do not deny that their state-law wrongful-discharge claim cannot survive this inquiry, because they could have challenged their discharge by filing an unfair labor practice charge with the NLRB. Rather, respondents attempt to limit *Platt* to its facts, especially the fact that the plaintiff there had unsuccessfully sought relief from the NLRB before filing his lawsuit. *See* Opp. 16.

That fact, however, cannot be legally dispositive. As noted above, the *Platt* court itself described the "critical inquiry" as whether the dispute "'could have been, *but was not*'" presented to the NLRB. 959 F.2d at 95 (quoting *Sears*, 436 U.S. at 197 (emphasis added)). Were the law otherwise, the plaintiff could control whether a claim was preempted by the NLRA by simply declining to file an unfair labor practice charge with the NLRB and proceeding directly to court—a particularly perverse result, because it would *encourage* circumvention of the NLRB. Even more fundamentally, limiting *Garmon* preemption to cases where the plaintiff has filed a claim with the NLRB would in no way further the purpose of *Garmon* preemption, which is to ensure that claims implicating industrial relations are directed to the very administrative agency created by Congress to regulate industrial relations. *See, e.g., Garmon*, 359 U.S. at 242-43. The issue is not whether there is an *actual* conflict between a state-court lawsuit and an unsuccessful NLRB charge; rather, the issue is whether there is even a *potential* conflict between a state-court lawsuit and an NLRB charge such that a plaintiff can engage in forum-shopping. *See, e.g., id.* at 242 ("We have necessarily been concerned with the *potential* conflict of two law-enforcing authorities, with the disharmonies inherent in the two systems, one federal the other state, of inconsistent standards of substantive law and differing

remedial schemes.") (emphasis added). Accordingly, there is no basis in principle or precedent for limiting *Garmon* preemption to cases where the plaintiff has filed an unfair labor practice charge with the NLRB. *See, e.g., Lockridge*, 403 U.S. at 280 (state-law claim preempted under *Garmon* where plaintiff did not file any charges with the NLRB).

To be sure, the *Platt* court noted that "[t]he risk of interference with the Board's jurisdiction" is particularly acute where a plaintiff tries to recast an unsuccessful unfair labor practices charge as a state-law claim. 959 F.2d at 95. But that point has nothing to do with whether a lawsuit alleging wrongful discharge in retaliation for complaining about workplace safety (and, as here and in *Platt*, seeking *inter alia* reinstatement and backpay) involves "interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [this Court] could not infer that Congress had deprived the States of the power to act." *Garmon*, 359 U.S. at 244. On the latter point, *Platt* recognized that "both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function, unlike the cases in which a local interest exception has been recognized." 959 F.2d at 95 (citing *Linn v. United Plant Guard Workers*, 383 U.S. 53, 63-64 (1966)).

In this critical respect, *Platt* is squarely inconsistent with *Paige*, *Inter-Modal*, and the decision below. *Platt* recognizes that the invocation of a state interest in workplace health and safety is insufficient to save from *Garmon* preemption a claim alleging wrongful discharge in retaliation for being (or supporting) a whistleblower on workplace-safety issues; the latter three cases hold the opposite. To say, as did the *Inter-Modal* court, that *Platt* "was limited to its facts," 73 Cal. App. 4th at 927, is thus disingenuous. Although *Platt* declined to decide "whether employee suits seeking redress for violation of state whistle-blower statutes are *generally* preempted under

Garmon," 959 F.2d at 95 (emphasis added), that is not the issue in this case. The issue in this case, and the issue that *Platt* decided, is whether *Garmon* preempts state-law *wrongful-discharge* suits where (as here and in *Platt*) "both the retaliatory misconduct alleged and the remedy sought are directly relevant to the Board's central function." *Id.* On this issue, the decision below is in direct conflict with *Platt*. Indeed, if anything, application of *Garmon*'s "local interest" exception is even *less* appropriate here (where the State of Washington does not even regulate workplace safety and health at this federal facility) than in *Platt* (where the Eighth Circuit conceded a "strong [state] interest in protecting workers who make job safety complaints," 959 F.2d at 95).* This Court's review is warranted to resolve this conflict, and to vindicate the supremacy of federal labor law by preventing state courts from usurping the NLRB's authority over industrial relations.

Finally, respondents suggest that petitioners did not preserve the *Garmon* preemption issue for this Court's review because petitioners "failed to raise this claim either in the state

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* Respondents inexplicably assert that "[p]etitioner has adduced no authority showing that persons employed by contractors at Hanford lack th[e] protections [of Washington State's health and safety laws], and respondents are aware of none." Opp. 17. But petitioners cited a Washington Supreme Court decision squarely holding that "the Legislature never intended for WISHA [the Washington Industrial Safety and Health Act] to apply to federal enclaves. The WISHA statute applies only to 'all work places within this state subject to the legislative jurisdiction of the state of Washington.'" *Department of Labor & Indus. v. Dirt & Aggregate, Inc.*, 837 P.2d 1018, 1023 (Wash. 1992) (citing Wash. Rev. Code § 49.17.230). Respondents tellingly do not deny that the Hanford nuclear facility is a federal facility governed by stringent *federal* health and safety standards, so that WISHA does not apply there either by its own terms, *see id.*, or as a matter of federal preemption, *see, e.g., Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180-81 (1988); *Consolidated Edison Co. v. Pataki*, 292 F.3d 338, 352-53 (2d Cir. 2002).

trial court, or in the federal district court below." Opp. 13. That suggestion is baseless. Petitioners did not raise the *Garmon* preemption issue in attempting to remove this case to federal court, because *Garmon* preemption (in sharp contrast to preemption under Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185) does not provide an independent basis for federal jurisdiction. *Compare Hayden v. Reickerd*, 957 F.2d 1506, 1511-12 (9th Cir. 1991) *with Avco Corp. v. Machinists*, 390 U.S. 557, 560 (1968). And petitioners did not raise this issue in the state trial court because they moved successfully to compel arbitration, and this issue was not relevant to that motion. Petitioners properly raised the *Garmon* preemption issue in the Washington Court of Appeals as an alternative ground for affirming the trial court's dismissal of the case, and the Washington Court of Appeals specifically decided that issue. *See* Pet. App. 10a-12a. Under settled law, nothing further is necessary to present the issue for this Court's review. *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663, 667 (1991); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979); Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, *Supreme Court Practice* § 3.19, at 185 (8th ed. 2002).

2. With respect to petitioners' motion to compel arbitration under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.*, respondents do not deny the existence of a lower-court conflict on whether waivers of a judicial forum for individual claims in a collective bargaining agreement are subject to a presumption in *favor* of or *against* arbitration. As noted in the petition, the Fourth Circuit has held that such waivers are subject to the ordinary presumption in *favor* of arbitration, while eight other federal circuits (as well as the California Court of Appeal and the court below) have held that such waivers are either *per se* unenforceable or at least subject to a presumption *against* arbitration. *See* Pet. 16-17. Rather than addressing this conflict, respondents simply insist that this Court implicitly

resolved it in *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998) by "articulat[ing] a general standard for the waiver of individual rights through a collective bargaining agreement." Opp. 19. Again, respondents are wrong.

The *Wright* court specifically *declined* to answer the question on which the lower courts are divided: "whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*." 525 U.S. at 80 (referring to *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)). Indeed, that question was not even presented in *Wright*, because that case did not involve the FAA. *See* 525 U.S. at 77 n.1. As noted in the petition, *Wright* simply held that the presumption in favor of arbitration *under the LMRA* does not apply to federal statutory claims, because that presumption is based on the principle "that arbitrators are in a better position than courts *to interpret the terms of a CBA*." 525 U.S. at 78 (emphasis in original). That reasoning has no bearing on the presumption in favor of arbitration *under the FAA*, which applies to *all* arbitration agreements *regardless of their subject matter*, and which trumps any contrary state law or policy. It is not surprising, thus, that courts have continued to recognize the ongoing conflict between the Fourth Circuit and other courts even *after* the *Wright* decision. *See, e.g., Rogers v. NYU*, 220 F.3d 73, 75 (2d Cir. 2000) (*per curiam*); *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc.*, 199 F.3d 477, 481-86 (D.C. Cir.), *vacated*, 199 F.3d 487 (D.C. Cir. 1999) (*en banc*), *reinstated*, 211 F.3d 1312 (D.C. Cir. 2000) (*en banc*).

Respondents thus miss the point by insisting that "the Court of Appeals' finding that the CBA in this case failed to satisfy the *Wright* standard is unassailable." Opp. 19. The question here is whether the *Wright* standard is the right standard in this context in the first place. Respondents here agreed to be bound

by the collective bargaining agreement negotiated by their union *as a general matter*; it would be squarely inconsistent with the FAA to hold that they are bound by that agreement with respect to all matters *except* arbitration. Indeed, as this Court recently emphasized, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than judicial, forum." *Circuit City Stores v. Adams*, 532 U.S. 105, 123 (2001) (internal quotation omitted). If unions can negotiate with respect to their members' *substantive* rights without any problem, there is no reason why unions should be barred from negotiating with respect to their members' *procedural* right to a judicial forum.

Finally, this case presents an excellent vehicle to address the proper presumption with respect to arbitration in this context, because the presumption here is dispositive. Petitioners do not deny that the arbitration provision here does not satisfy the *Wright* standard, because that provision by its terms does not state that wrongful-discharge claims are subject to arbitration. *See Wright*, 525 U.S. at 79-82. By the same token, however, respondents do not deny that arbitration would be warranted here under the FAA's traditional presumption in *favor* of arbitration. To the contrary, respondents concede that the arbitration clause applies to disputes that "'arise out of the interpretation *or application* of this AGREEMENT,'" Opp. 8 (quoting Resp. App. 19a; emphasis added), and the Agreement in turn provides that "[e]mployees shall not be discharged for refusing to work in the above-described situations [involving potential health and safety violations]," Opp. 9 (quoting Resp. App. 18a; emphasis omitted). Applying a presumption in favor of arbitration, there can be no serious doubt that respondents' wrongful-discharge claim involves the "application" of the Agreement, and thus falls within the scope of the arbitration clause. Accordingly, this case turns on the proper presumption

to be applied in construing the arbitration provision, and allows this Court to resolve the "obviou[s] . . . tension" between its *Gardner-Denver* and *Gilmer* precedents, *Wright*, 525 U.S. at 76, and the resulting split of authority on a union's ability to waive its members' right to a judicial forum.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of *certiorari*.

Respectfully submitted,

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